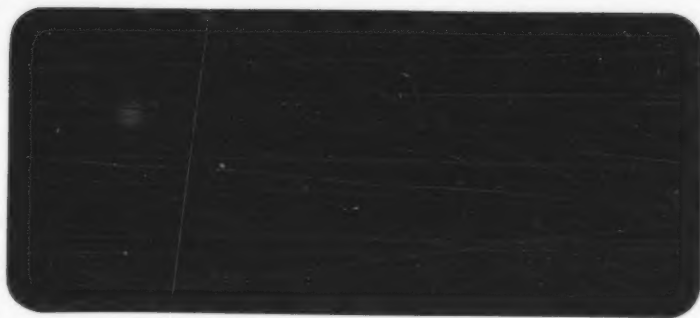




A DISCUSSION PAPER
TOWARDS A FARM PRACTICES BILL

DECEMBER 21, 1989

SUMMARY OF
A DISCUSSION PAPER TOWARDS A FARM PRACTICES BILL
MANITOBA AGRICULTURE

Background:

Some practices carried out by farmers in the normal production of crops and livestock result in the generation of things like odour, noise, dust, etc. that may be considered nuisances to other people living or working nearby. These would be considered nuisances that are not contaminating water bodies or dangerous in any way to people or the environment. The farmer can usually control excesses of such nuisances by employing good management practices and common sense and consideration for his neighbors. It is after the farmer has done everything reasonable and within his control that manure still has an objectionable odour or tractor noise bothers someone when the farmer is working into the night.

Farmers have been sued for nuisance in Manitoba, other provinces and U.S. states over the years, resulting in passage of "right-to-farm" legislation in at least 7 provinces and 30 states. Manitoba's Nuisance Act was passed in 1976 to protect all types of business from nuisance suit for odour only. The Act has no provision for determination of acceptability of practices employed in the event of complaints, nor is it readily identified with by the agricultural community.

Manitoba's agricultural areas are increasingly being encroached upon by non-farm uses, resulting in significantly more neighbors in rural areas with lowered tolerances for what are usually considered normal farm practices. Most other legislation in this area is specific to agriculture and covers more than only odour. Manitoba's agricultural industry requires increased support to help ensure its continued viability into the future.

Discussion:

A farm practices act could serve to protect agricultural operations that are operating in an acceptable manner from frivolous or vexatious complaints and/or unwarranted nuisance suits in a court of law. "Agricultural operation" could mean an agricultural, aquacultural, horticultural or silvicultural operation and could include the cultivation of land, the production of crops and the raising of livestock.

The legislation could provide that agricultural operations that do not violate land use control laws or environment or health acts would not be liable in nuisance as a result of an "acceptable farm practice" and could not be prevented by injunction or other order of a court from carrying on the agricultural operation.

The act could provide for a board to which complaints could be directed for judgement as to the acceptability of a farm practice. An "acceptable farm practice" could mean a practice

that is conducted in a manner consistent with proper and accepted customs or standards. This could be determined by the Board. The Board could also determine if new practices and new technology can be deemed acceptable.

Board membership could be appointed primarily from the agriculture community, but could also include some non-farm membership. Technical expertise could also be part of, or available to the Board.

Complaints about a farm practice could first be made to the department of Environment. If the practice in question does not appear to be in conflict with the Environment Act, other legislation or local by-law, then the Board could be requested to investigate and determine if it is an acceptable farm practice. The Board would be required to include reasons for its decision in its report.

The Board could recommend corrective and remedial measures that must be taken by an farm operation before the Board would be prepared to certify the practice were acceptable. If the Board determined an agricultural practice not to be conducted in an acceptable manner, that operation could be subject to nuisance suit in the courts, or where applicable, to penalties under acts such as Environment or Public Health.

The Board would be able to dismiss applications that were frivolous, vexatious or made by persons without sufficient personal interest in the matter.

Cautionary Notes:

Other jurisdictions have experienced some tendency on the part of local planning bodies to rely too heavily on this type of legislation to protect farmers from encroachment. Such reliance is false in that the inevitable result is constant conflict or zoning restrictions being put on farm activities once non-farm resident presence becomes significant in an area. Proper planning must go hand-in-hand with this legislation. Planning is the only effective tool to prevent conflict situations from developing. Farm practices legislation is simply a method of trying to lessen conflict once it has developed and keeping it out of court if it is unwarranted.

Slightly fewer than half of Manitoba's rural municipalities have planning documents as yet. Legislation such as this could be seen to be giving agriculture free rein in those areas to impose unacceptable operations onto neighbors already there. The presence of a farm practices board to investigate and rule on acceptability of farm practices should prevent problems in this respect.

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1. Why a concern?

For many years now, the numbers of farms in Manitoba have decreased, while farm sizes have increased and sizes of intensive livestock operations have increased. At the same time, the number of rural non-farm residents scattered throughout farming areas has increased significantly. Incidents of conflict between farmers and other rural residents have become increasingly common. Even the best managed farm operations frequently produce certain levels of noise, odour, dust or other 'nuisance'.

Livestock farmers in Manitoba, other provinces and the U.S.A. have been taken to court by their neighbors and fined substantially for creating odours the courts deemed to be an unacceptable nuisance. Manitoba's Nuisance Act was passed in 1976 in response to one such court action. That Act says any business operating in accordance with other legislation cannot be held liable in a court of law for nuisance due to odour. The Nuisance Act is not specific to agriculture, it does not address nuisances other than odour, nor does it provide a mechanism for resolution of disputes.

The general public should be able to expect safety from pollution and be protected from dangers to health. They should also be able to expect not to be unduly bothered by intolerable conditions arising from poor farm management practices. At the same time, the farmer must be secure in his ability to continue producing food supplies in Manitoba.

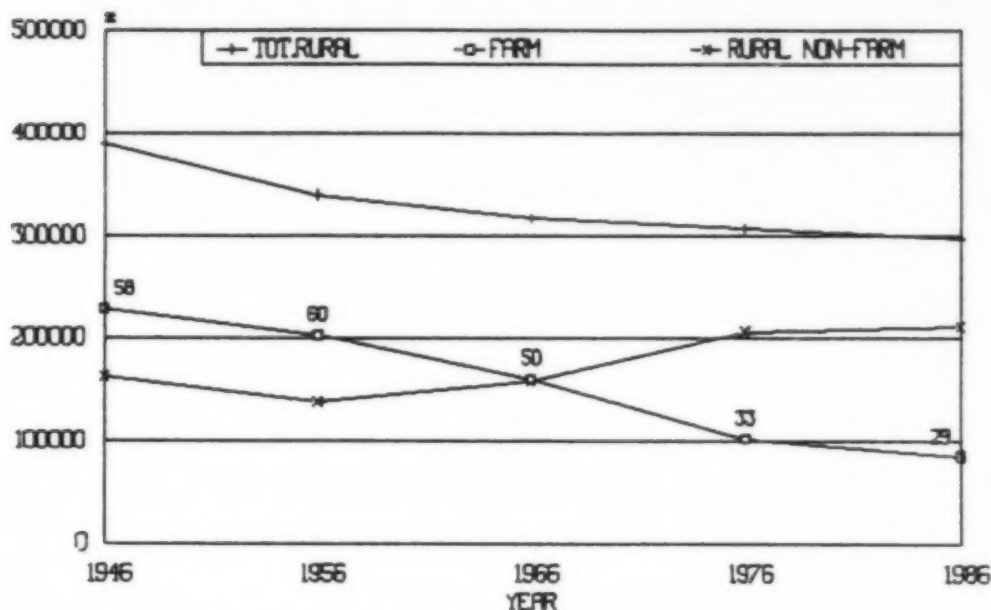
2. Purpose of this discussion paper

Manitoba's new Environment Act seeks to regulate pollution of water, air and soil. It does not define where pollution harmful to humans or the environment ends and where nuisance begins. There are precedents in common law relating to the creation of nuisance by a landowner.

Some municipal governments have introduced by-laws under The Planning Act regulating siting of livestock operations in relation to communities, rural residences and recreation areas. Unfortunately, livestock guidelines do not exist in Manitoba to assist local governments or farmers to plan so as to avoid potential conflict.

Many farmers are uncertain about the security of their investments and find long-term planning for expansions difficult. The purpose of this paper is to examine the existing situation and to suggest what changes to laws and/or regulations might improve the present situation for all concerned. It is hoped the information in this paper will encourage suggestions on how the government should proceed.

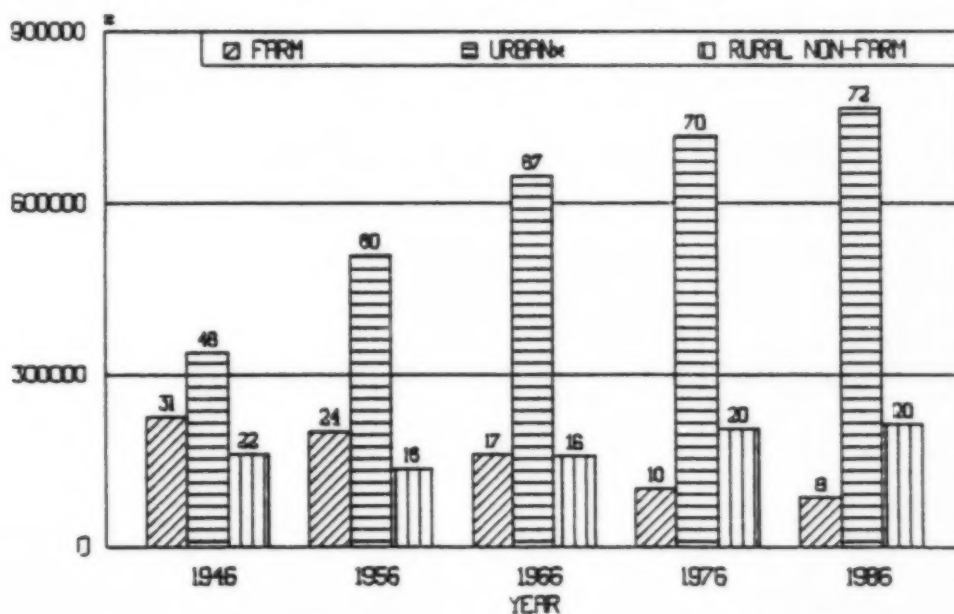
RURAL POPULATION* (Number and Farm as % of Rural Total)



* Includes centers <1000 population

(State Canada)

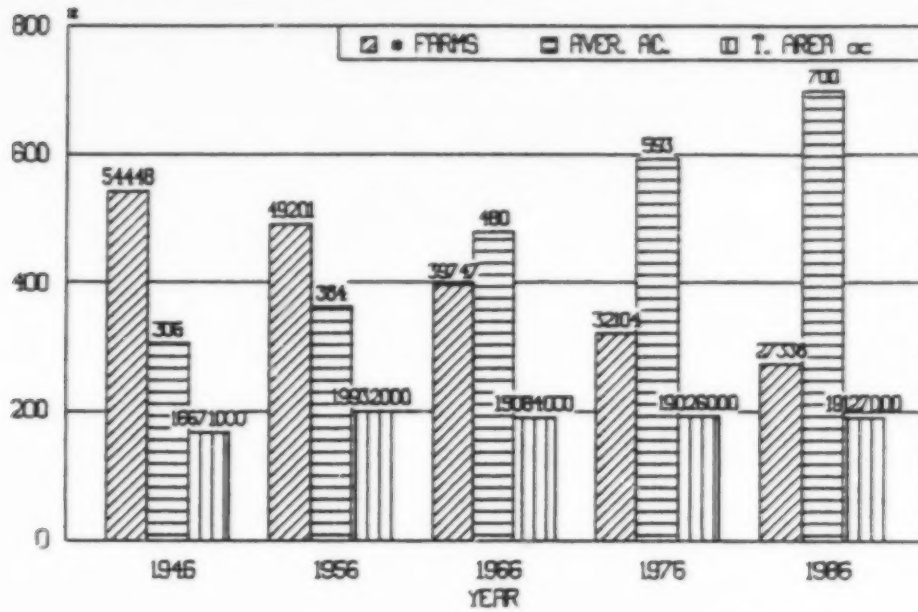
MANITOBA POPULATION (Number and % of Prov. Total)



* Urban centers >1000 population

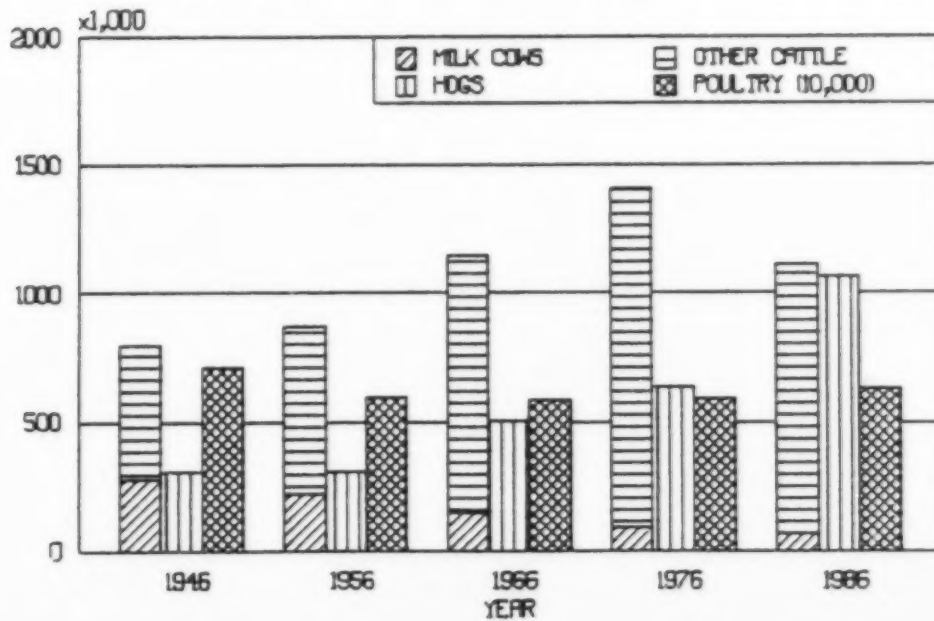
(State Canada)

FARMS & FARM SIZE



(Stats Canada)

LIVESTOCK



(Stats Canada)

3.3 Resulting conflicts:

The statistics show there has been a substantial increase in the number of large, intensive livestock and poultry operations, as well as a significant increase in non-farm residential building in agricultural areas. Often large livestock operations build or expand in proximity to neighboring homes, both farm and non-farm. New residences and certain types of people-intensive uses are continually being built and developed in open agricultural lands or intensive livestock areas. Under proper management, even the large livestock operations need not create water pollution problems. Pollution, if it occurs, can be dealt with under the Environment Act. However, even the best management practices are unlikely to prevent a certain degree of objectionable odours from emanating from barns, feedlots and waste disposal activities of farm operations. Similarly, many normal farm operations create dust, vibrations, machinery noise (continuous or at odd hours), traffic, bothersome insects (flies or bees), light from greenhouses, etc. Many such activities can be considered "nuisances" by neighbors not engaged in or accustomed to similar activities.

4. Rights and nuisances

4.1 Landowners rights

A landowner has a right to enjoy his property without undue interference from his neighbors. This is true whether he be a farmer or non-farm rural resident. No one is allowed to pollute the environment in which we all live. Neither should a landowner create any unreasonable noise, dust, vibration, or odours which travel from his property to those of his neighbors. The key word here is unreasonable.

Our cities are filled with high levels of often irritating activities such as heavy traffic volumes, traffic noise, industrial and commercial noise and odour, constant lights and comings and goings of people. Many people live and work in the midst of these "normal" city activities and accept them as part of their everyday environment. Those who choose not to want such irritations live in quiet neighborhoods away from the activity. In our agricultural areas certain levels of odour, noise, dust and other activities occur on occasion or sometimes nearly constantly. Without them there would be no food in our supermarkets.

When people build or buy homes in or adjacent to areas designated or used for agriculture, they should do so in the knowledge that there will be odour, noise, dust and other

activities from those agricultural operations. They need to be willing to accept a reasonable level of activity as a necessary part of food production and farmers attempting to make their living. At the same time, people should not be expected to accept unreasonable nuisances.

The problem to be resolved is to identify what it is that neighbors should accept as reasonable, and how best to ensure that both neighbors and the farm operators are protected from harassment from each other.

5. What can be done?

There are several interrelated areas or directions which could be addressed or taken to help avoid, minimize or resolve future problems between farmers and their neighbors, both farm and non-farm neighbors. These are based on the following assumptions:

- planning for the future can set goals and expectations for an area and allow people to organize and carry out their actions and activities accordingly.
- separation is often seen as a quick and easy answer to deal with conflict. Separation is tied in with and is part of the planning process through zoning, however, it is also a tool of farm management.

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- management or operation of farming activities can be the largest factor in determining their acceptability or their degree of nuisance.

- there is a need for a mechanism or process to address and resolve conflict when it does occur. This includes determination of what constitutes reasonable farm practices, degree of nuisance, protection of property and individual rights, and protection of farmers from harassment and frivolous or vexatious law suit.

5.1 Planning in Manitoba:

The Planning Act was enacted in 1976 in an attempt to provide guidance and controls in the areas of rural and urban planning. Regulations were developed for subdivision control. Provincial Land Use Policies were adopted by order-in-council in 1980. Four of the 13 Land Use Policies deal specifically with agricultural land, with rural residential subdivision and with urban expansion. The Policies are intended to guide subdivision and development in municipalities with no plans developed and to serve as a guide for local governments to follow when preparing their own local development plans or basic planning statements.

The Provincial Land Use Policies and most local plans set forth principals and objectives to protect prime farmland and protect agricultural activities such as livestock operations where they

are viable and/or dominant. The Provincial Policies and most local plans, however, do not allow for designation of areas exclusively for agricultural use where other uses would be excluded. The Provincial Policies and most local plans make provision for various exceptions including retirement lots, lots for people associated with the farm operation, subdivision of vacant or surplus farmsteads, and sometimes non-farm residential lots on lower class lands within farming areas.

It has been the widespread experience, here and elsewhere, that regardless of the circumstances for which lots have been created in farming areas it is only a matter of a few years before the largest majority of such lots are resold one or more times and eventually are occupied by non-farm rural residents. If these new residents have moved into the area, they may not appreciate the complexity and/or the effects of the normal agricultural activities around their new home. Even people who are native to the neighborhood may not have the same level of tolerance for agricultural odour, noise and dust that the farm operators themselves have.

It is a commonly accepted fact that introduction of new and different uses involving people into an agricultural area greatly increases the potential for conflict and controversy between neighbors. Ideally, it would be best to have people-oriented non-agricultural uses in defined locations where prime farmland is not involved and where a minimum of farm

activities are impacted by their presence. The Planning Act and the Provincial Land Use Policies do provide considerable opportunity to carry this out to a large degree. This type of forward planning, however, demands a total commitment and much hard work on the part of everyone involved to bring it about. Farmers, rural dwellers, urban residents, local municipal government, provincial government and numerous resource people all have to cooperate.

In areas of Manitoba where considerable non-agricultural uses have developed in rural locations, the farmer has rapidly become a minority in the voting power of the local municipality. Census figures show that farmers comprise less than 50% of the population outside incorporated centres in 62 of the 117 rural municipalities and local government districts in Agro-Manitoba. Given this situation, farmers are increasingly at risk in terms of being able to ensure their rural environs remain open and receptive to normal agricultural activities without imposition of restrictive and/or costly limitations on their management practices or ability to grow and develop.

5.2 Separation of uses:

Livestock operations are exempt from requiring licencing under The Environment Act. They are required only to register with the Environment Department if they are over a certain size and/or within specified distances of residences or residential centres.

This registration carries no approval or endorsement of the size, type, location or management of the operation. Regulations state only that wastes must be retained on the operator's lands and prevented from entering any body of water, wastes shall not be spilled on public roads, and dead animals properly disposed of.

Some municipalities have developed and incorporated some separation distances into their zoning by-laws under their planning documents. The ones in existence vary respecting their application and distances. Most place a buffer around urban centres, some include designated recreation areas and rural residential areas, and some include individual residences other than those of the livestock operators.

The biggest problem with using separation distance to resolve conflict is that one party is required to be totally removed from the area. When it is the agricultural use removed by creation of buffer zones, we have created around the non-agricultural use an agricultural no-man's land as far as the limited use is concerned. Buffer zones effectively sterilize an area many times the size of the actual area the buffered use occupies. Such a practice can be very damaging to the agricultural viability of the affected area and perhaps highly unfair to the farmers within that buffer area.

Another difficulty in dealing with separation distances is that a workable solution depends on many factors. Management practices and operator attitude are probably the most influential factors respecting acceptability or offensiveness of a livestock operation. A small, poorly run facility may be a much greater problem and source of neighborhood conflict than is a well operated large intensive livestock facility. Type of livestock varies, hogs probably create the most disagreeable odours to people, with dairy at the low end of the scale and feedlots and poultry somewhere between. Size of operation has an effect on sphere of influence. Type, nature and intensity of surrounding uses is important. Some of these factors are difficult to spell out in tables or documents and expect workable solutions. Perhaps the most reasonable approach would be to individually evaluate the individual circumstances for medium to large operations or those in certain critical or mixed-use areas.

This would seem to suggest that separation distance is perhaps only a partial answer at best. It can easily be overdone to the detriment of the agricultural industry and still not resolve or remove the nuisance. The responsible operation and management of farming activities along with judicious planning to preserve agricultural areas may offer the greatest potentials for prevention of conflict. None of these, however, are capable of resolving conflict once it starts.

5.3 Management of farming activities:

Few farming activities can be undertaken in isolation or without recognizing the existence of neighbors and conflicting adjoining uses. The onus falls upon the farmer to undertake his activities in an environmentally and socially acceptable manner. The environmental aspect is often closely regulated by acts such as The Environment Act and Health Act.

In the area of livestock waste handling, the Canada Animal Manure Management Guide outlines some of the important considerations and issues in handling of wastes and offers several constructive solutions and points to be considered in livestock facilities. The Canadian Society of Agricultural Engineers are currently developing several comprehensive information packages on livestock waste management that will facilitate revision of this Guide and serve as valuable resource material in addition.

The elements of siting, design and operation of livestock facilities along with the previous issue of separation distance are all part of a required livestock guidelines package for Manitoba. Such guidelines need to be in concert with The Environment Act and its regulations and could serve as the basis for evaluation of applications for livestock facilities at the municipal level. There may be a need for minimum provincial standards, while still maintaining the necessary flexibility to

deal with and allow for the individual site circumstances and situations. The challenge will be to develop a workable system to accomplish both objectives.

While guidelines appear to be desirable and needed for livestock, there may also be distinct advantage in development of guidelines or "codes of practice" for all aspects of agriculture in the province. Such guidelines or codes could serve several purposes, not the least of which would be to inform the general public of the position and responsibility of the agricultural industry in Manitoba respecting world food production, sustainable development, environmental protection, and social responsibility. Comprehensive agricultural guidelines or codes would also be useful in assisting farmers to plan their future operations and investments. They would assist local and senior governments in evaluating other uses proposing to locate in agricultural areas, as well as evaluating agricultural expansions in mixed-use areas. The ultimate goals would be avoidance of conflict and added security and peace of mind for all concerned.

5.4 Nuisance:

"A public or common nuisance is an act which interferes with the enjoyment of a right which all members of the community are entitled to, such as the right to fresh air, to travel on the highways, etc. ..."

"A private nuisance is a tort consisting of (1) any wrongful disturbance with a person's use or enjoyment of land ...; (2) the act of wrongfully causing or allowing the escape of deleterious things into another person's land, e.g. water, smoke, smell, fumes, gas, noise, heat, vibrations, electricity, disease-germs, animals and vegetation. Nuisance is commonly a continuing injury, and is actionable only at the suit of the person in possession of the land injuriously affected by it: there must be actual damage to the plaintiff."

There have been a number of instances in Manitoba where neighbors have complained that the smell of livestock barns and feedlots create nuisances. In many instances, discussions with the farmer have resulted in steps being taken to make some operational changes and mitigate the problem to a large degree. The Clean Environment Commission have held several public hearings on the issue of odours. Some have involved operations in or close to urban centres and some have been in more rural locations. Commission orders to livestock operators have usually been confined to cleaning up unsanitary conditions or obvious water pollution problems. The Springfield Hog Ranch case in the mid 1970's has been the only nuisance suit against a Manitoba farmer to go to court. That case resulted in a substantial judgement being handed down against the farmer for nuisance due to odour. It was that case that resulted in passage of the Nuisance Act in 1976.

The Springfield Hog Ranch situation was a classic example where what had traditionally been an agricultural area had been allowed to change over a period of years into a very mixed-use area. Many small acreage rural residential homes built up nearby and a golf course developed within one half mile. There were eventually dozens of non-agriculturally oriented people living and playing in very close proximity to a somewhat smelly pig operation. Those people decided it was time for the hog operation to stop smelling up the neighborhood and took action to do so. Manitoba had no nuisance legislation and the court sided with the plaintiff. The hog operator could likely have done several things to clean up his operation and reduce odours to a degree, however, there would have been absolutely no way for him to stop the operation from still emitting a significant level of odours much of the time.

Since 1976, The Nuisance Act has said that as long as a business such as a hog operation is not polluting the environment, creating a health hazard, or contravening a local by-law it cannot be held liable in court for nuisance due to odour nor can it be prevented by injunction from carrying on business. It is important to note that the laws of Manitoba do not allow local governments to pass by-laws retroactively that would cause an existing business such as a livestock operation to suddenly be declared to be operating in contravention of that new by-law. When new by-laws are passed, an existing use on a property may be declared to be a non-conforming use and may be restricted

from expanding or changing the type of use on that property. They cannot be forced to suddenly shut down and move out of the neighborhood. They could of course be bought out and the offensive use discontinued. There is a provision in The Environment Act called abatement, whereby a municipality may undertake, with the approval of and possible participation by the province, to pass a by-law and to raise the funds necessary to purchase a business which is deemed to be in the best interests of the community to be discontinued in that location. Abatement has not been utilized to date in Manitoba with respect to any livestock operations that have generated complaints of nuisance.

The Nuisance Act and other forms of right-to-farm legislation in Canada and the U.S.A. are statements by the legislatures in those jurisdictions that businesses such as farms have the right to be able to expect to carry on their operation in a reasonable manner without fear of being taken to court and arbitrarily stopped. Such legislation serves to ensure that the farmer is not continually spending his time and money involved with the legal system trying to defend himself and his actions. In other words, he is left in relative peace to attempt to ply his chosen profession as long as he does so within the laws of the land.

It is reasonable that livestock farms not be allowed to establish or expand in urban or designated rural residential or recreational areas, but if a farm operating in a rural

agricultural area can be jeopardized by neighbors who move next to him to live or to play, then where can many types of farms safely operate? The balance must be reconsidered between the needs of society for a food supply and farmers to farm peacefully and the rights of individuals to move to any location they wish and expect to have urban residential conditions prevail there. People cannot expect to move to rural areas and enjoy all the amenities which exist there, such as open space and pleasant scenery, without accepting all the agricultural operations which occupy that open space and pleasant scenery.

Careful consideration should be given to legislation which would give the farmers of Manitoba security to continue farming in those areas which have been traditional agricultural areas, without fear of closure resulting from other conflicting uses moving into their areas. It is of lesser importance how long a particular barn or farm has been in operation than where that farm is located. If it is located in an area that has traditionally been agricultural or it expands or moves into an area that it is allowed to be in according to local by-laws, then it should have security against closure. While it is reasonable to expect a farm to operate according to certain guidelines to minimize the odours it creates, it is not reasonable to expect a farm to operate in the normal production of crops or livestock without creating some odours, noise, dust, etc. as part of its usual operations.

If it is reasonable that the balance of rights should be weighted toward a resident in an urban area, it should also be reasonable that the balance should be weighted towards a farmer in rural agricultural areas. Legislation is one way to clarify where this balance should be and what security landowners have, whether they be farmer or non-farmer, in our changing society.

6. Considerations for legislation:

Manitoba's Nuisance Act is a limited form of right-to-farm legislation, except that it is not specific to farms and it is limited to nuisance due to odour. The Act does not attempt to define acceptable agricultural practices, nor does it attempt to mediate or resolve conflict. The onus of proof of nuisance is placed on the plaintiff.

Most states in the U.S.A. have various forms of right-to-farm legislation. Six other provinces have farm practices acts that have been legislated between 1986 and 1989. They are: British Columbia, Alberta, Ontario, Quebec, New Brunswick and Nova Scotia. Some of the acts are called Agricultural Operation Practices acts, while Quebec's right-to-farm legislation passed in 1989 is included in their Act to Preserve Agricultural Land (comparable to Manitoba's Planning Act). All six are specific to agriculture in the protection they offer. Three cover the nuisances of odour, noise and dust, one covers only odour and noise, while two cover unspecified nuisances from farms. Other

nuisances from farms could also include vibration, light, insects, etc.

Only three of the other acts provide any mechanism for possible resolution of disputes. Nova Scotia's provides for a ministerial advisory committee that may make recommendations to the minister, who may then take some type of action. Quebec's Act provides for a Commissioner who is empowered to hear complaints against a farm practice. Ontario's Act has established a Farm Practices Protection Board that is appointed by the minister and is made up primarily of citizens. Such a board would be comparable to the Public Utilities Board or Municipal Board in Manitoba. Complaints are directed firstly to the Ministry of Environment who determine whether or not there is any contravention of that Act or whether some simple remedial measures may be implemented to rectify the situation. If neither, then the complaint is referred to the Farm Practices Protection Board. That Board has the power to undertake an investigation of the situation, hold a public hearing if necessary, and rule on whether the farm practice in question is being carried out in an acceptable manner or not. If the practice is not acceptable, the Board may order changes to take place and levy penalties if not so done. The farm could be subject to action in the courts if corrective measures are not taken.

All acts require that the farm practice must comply with existing legislation, including local by-laws. However, once determination is made that compliance exists, these farm practices acts provide protection to the farmer. Quebec's law makes provision for the Commissioner to hear farmer's complaints if they believe that proposed new municipal by-laws may adversely affect their farm operations. The Act does not elaborate on how this would be done.

Five acts require normal agricultural practices to be followed by the farmer. Ontario is the only one to make any attempt to define normal practice and then only in a general way. They do, however, give the Board the power to determine what is or is not a normal practice.

Quebec's Act to Preserve Agricultural Land provides for municipalities to define agricultural zones on prime farmlands and on peatlands. This is similar to the power given to Manitoba's municipalities under The Planning Act to designate agricultural areas in their plans. Quebec goes on further to allow for defining exclusive agricultural sectors within the agricultural zones. The exclusive sectors appear to differ only in respect to subdivision of lots. Quebec's Act does not provide for setting up of agricultural zones in areas of low quality land where livestock operations are intensively developed and could be adversely impacted by encroachment of non-agricultural uses.

Quebec's Act provides for establishment of a Farm Activities Fund to ensure the defence of producers against whom an action has been instituted by reason of dust, odour or noise resulting from farming activities in agricultural zones.